# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1953**

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**No. 53**

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UNITED STATES OF AMERICA,

*Appellant,*

*v.*

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., A CORPORATION OF NEW YORK; INTERNATIONAL BOXING CLUB, A CORPORATION OF ILLINOIS; MADISON SQUARE GARDEN CORPORATION, A CORPORATION OF NEW YORK; JAMES D. NORRIS; AND ARTHUR M. WIRTZ,

*Appellees*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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## MOTION TO AFFIRM

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WHITNEY NORTH SEYMOUR,
*Counsel for Appellees.*

BENJAMIN C. MILNER,
CHARLES H. WATSON,
RALPH M. MCDERMID,
*Of Counsel.*

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# No. 729

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UNITED STATES OF AMERICA,

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## MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CIVIL ACTION NO. 74-81

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Appellees move the Supreme Court of the United States, pursuant to Rule 7, paragraph 4 and Rule 12, paragraph 3, of its Revised Rules, that the final judgment of the District Court be affirmed, or, in the alternative, that the appeal be dismissed.

The ground of the motion is that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

## Opinion Below

There was no opinion below. Appellees' motion to dismiss the complaint was granted at the conclusion of oral argument. The remarks of the Court (Hon. Gregory F. Noonan, D. J.) in connection with the granting of the motion were not transcribed.

## Proceedings Below

### *The Allegations of the Complaint*

The complaint alleges, in substance: that the appellees Madison Square Garden Corporation (Garden), James D. Norris and Arthur Wirtz are stockholders in the two other corporate appellees, International Boxing Club of New York, Inc. (IBC (N. Y.)) and International Boxing Club Inc. (IBC (Ill.)); that while the voting power in IBC (N. Y.) and IBC (Ill.) is, roughly speaking, evenly divided between the Garden, on the one hand and Wirtz and Norris, on the other hand, the main financial interest in IBC (N. Y.) is owned by the Garden and the main financial interest in IBC (Ill.) is owned by Wirtz and Norris (Complaint Pars. 8 and 9); that through stock ownership, leases and agreements, the appellees have the exclusive right to lease for the promotion of professional boxing contests certain outdoor stadia and indoor arenas in New York, Chicago, Detroit and St. Louis; that through the employment of so-called "return match"[1] and "exclusive service"[2] contracts,

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[1] Return match contracts provide that if the contender, in a championship boxing contest, should win, thereby gaining recognition as champion, he will engage in a return bout with the former champion, thereby giving the latter an opportunity to regain the title.

[2] Exclusive service contracts provide that the boxer in question will,

coupled with control of the above mentioned stadia and arenas, 19 out of the 21 professional championship boxing contests presented in the United States between June, 1949 and March, 1952 were promoted [3] by appellees or with the participation of appellees; and that it follows that defendants have a monopoly of the promotion of professional championship boxing contests and the various "by-products" thereof.

## Argument

THE DECISION OF THIS CASE IS GOVERNED BY THE RECENT DECISION OF THIS COURT RELATING TO PROFESSIONAL BASEBALL.

Appellees' motion to dismiss the complaint was based squarely on the decision of this court in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953). In that case this Court held that the doctrine of *stare decisis* required adherence to the proposition, established in *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), that professional baseball was not within the scope of the Federal antitrust laws. The argument made before the District Court and to be made here is, very simply, that professional boxing is indistinguishable from professional baseball, so far as the antitrust laws are concerned. The *Federal Baseball Club* case talked in terms of local exhibitions, of which interstate travel was only an incident. That the *Federal Baseball Club*

during a specified period, engage only in boxing contests promoted by the other contracting party, except with the consent of such party. Provisions relating to exclusive services are sometimes included in "return match" contracts. As shown by the *Toolson* case, the exclusive rights of one baseball team to the services of its players is the foundation of the whole structure of organized baseball.

[3] The promotion of a boxing contest involves in essence, as indicated by the complaint (Par. 13), contractual arrangements with the two boxers involved in the principal contest, arranging for the locale of the contest, arranging the preliminary contests, and, where sufficient interest exists, the sale of radio, television, motion picture or other rights to the contest.

case thereby established a principle and is not to be limited to professional baseball, is evidenced by its citation, without any such limitation, in numerous cases dealing with the field of entertainment.[4] The instant case, however, deals with a competitive sport which is similar, in all respects, to baseball and which, therefore, is much closer on the facts than cases dealing with, for example, vaudeville act bookings. Since a boxing bout, like baseball, is a purely local exhibition, (in connection with which the use of interstate travel or communication is much less important than in baseball) the principle laid down in the *Federal Baseball Club* case and adhered to, on the basis of *stare decisis*, in the *Toolson* case, must be applicable here; any different result would require a magnification, amounting to distortion, of the microscopic differences between professional baseball and professional boxing.

Our contention that the *Federal Baseball Club* case established a principle of general applicability and is not, as appellant here contends, to be limited to baseball, is supported by decisions handed down since the decision of this Court in the *Toolson* case. In *Shall* v. *Henry et al.*, 211 F. 2nd (March 5, 1954), 237 the Court of Appeals for the Seventh Circuit dismissed the complaint in a treble damage suit involving some of these appellees and substantially the same allegations. In *U. S.* v. *Lee Shubert et al.*, 120 F. Supp. 15 (S. D. N. Y., December 30, 1953), Judge Knox dismissed the complaint in an antitrust action involving legitimate theatre productions. In the instant case, the Court below, in dismissing the complaint, must have rejected the argument made by counsel for appellant seeking to confine the *Toolson* case to professional baseball. In *U. S.* v *National Football League, et al.*, F. Supp. (E. D.

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[4] E.g. *Hart* v. *Keith Exchange*, 262 U. S. 271; *Ring* v. *Spina*, 148 F. 2d 267, *Conley* v. *San Carlo Opera Co.*, 163 F. 2d 310.

Pa., November 12, 1953) Judge Grim distinguished the *Toolson* case, but did so on grounds which clearly showed that he did not see any distinction between professional baseball as such and professional football.

### A. *Professional Boxing, Like Baseball, Was Entitled to Rely, and Has Relied, on the Federal Baseball Club Case*

That professional boxing was entitled to rely on the decision in the *Federal Baseball Club* case clearly appears from the following statement contained in the decision of the Circuit Court of Appeals in that case,[5] to which statement we have taken the liberty of adding boxing terminology in brackets to demonstrate the complete applicability of the language used:

> "The business in which the appellants were engaged, as we have seen, was the giving of exhibitions of baseball [boxing]. A game of baseball [boxing bout] is not susceptible of being transferred. The players [contestants], it is true, travel from place to place in interstate commerce, but they are not the game [bout]. Not until they come into contact with their opponents on [in] the baseball field [ring] and the contest opens does the game [bout] come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. The exertions of skill and agility which they witness may excite in them pleasurable emotions, just as might a view of a beautiful picture or a masterly performance of some drama; but the game [bout] effects no exchange of things according to the meaning of 'trade and commerce' as defined above." (269 Fed. 681, at pp. 684, 685).

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[5] It is proper to direct attention to the opinion of the Circuit Court of Appeals because this Court, in affirming the decision below, characterized the opinion below as going "to the root of the case" (259 U. S. 200 at p. 208).

The foregoing quotation shows the criteria used to establish the principle laid down in the *Federal Baseball Club* case; those criteria were obviously as applicable to professional boxing. That being so, professional boxing, in its development since 1922, has been entitled to, and did, rely on the *Federal Baseball Club* decision.

B. *Boxing and Baseball as Presently Conducted are Indistinguishable From the Standpoint of the Anti-trust Laws.*

As appears from an examination of the complaint, it may be said that professional championship boxing is to boxing generally what major league professional baseball is to baseball as a whole; professional championship boxing is, however, a mere sideshow compared to major league baseball, from the standpoint of participants involved, customers attracted, investment required, and dollar receipts from all sources. For instance, there can be, by definition, only eight professional boxing champions at any one time (Complaint, Par. 11) whereas the sixteen major league baseball teams will have at least 400 players under direct contract at all times. According to the dissenting opinion of this Court in the *Toolson* case, major league gross revenues for the year 1950 were over $32,000,000, whereas gross receipts of championship boxing matches over a three year period (Complaint, Par. 16) were only $4,500,000, or at the rate of $1,630,000 per year. It is apparent, therefore, that the public interest in boxing, emphasized here by appellant (Statement, pp. 10, 11) is, when measured by the business criterion of dollar receipts, only one-twentieth as much as the public interest in major league baseball.

Appellant confuses the issue by comparing baseball as it was conducted in 1922 with boxing as it is conducted in the present era of radio and television (Statement pp. 7-10).

The proper comparison, of course, is between professional baseball today, as it was presented to this Court in the *Toolson* case, and boxing today, as presented in the complaint. Such a comparison shows clearly that professional boxing as presently conducted has considerably fewer aspects of interstate trade or commerce than baseball as it is presently conducted; and the same was necessarily true of boxing in 1922 as compared with baseball in 1922. Baseball, as has been noted in both the *Federal Baseball Club* and the *Toolson* cases, requires a planned pattern of interstate movement of personnel and equipment on the part of the teams involved; boxing contests, on the other hand, are between two individuals, whose skill and personality, rather than place of origin, are significant in eliciting interest in the contest. The impact and effect of radio, television, motion pictures and other modern methods of communication upon boxing are not basically or essentially different from their impact and effect on baseball.[6]

A boxing promoter, like the owner of a baseball club, is dependent for his receipts upon public interest in the contests he presents. That interest is primarily represented by the purchase of tickets of admission to the contest. There are, however, as in baseball, corollary sources of revenue to be tapped in reaching those members of the public who do not purchase tickets of admission but who can be induced to watch or listen to, through television, motion pictures or radio, a simultaneous or delayed presentation of the contest. Seeking to avoid the *Toolson* decision, appellant emphasizes the allegation of the complaint that receipts from the sale of motion picture, radio and television rights amount to approximately 25% of the

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[6] The dissent in the *Toolson* case characterizes the "sharp increase" in radio and television receipts as "continuing." Compare the allegations of Paragraph 16(a) of the Complaint in the instant case.

gross receipts of boxing (Statement, p. 5). But the complaints in the *Toolson* and companion cases contain substantially similar allegations.[7] The dissenting opinion in the *Toolson* case shows that major league baseball derives more money in one year from radio and television than professional championship boxing derived from all sources during the three year period covered by the instant complaint. The ambit of the antitrust laws, and the determination of whether the courts or Congress should expand that ambit, cannot hinge upon what can only be a trifling difference in degree.

Appellant also attempts to distinguish the *Federal Baseball Club* and *Toolson* cases on the ground that the basic issues presented in both cases were the tightly integrated structure of professional baseball as exemplified by the various intra-league and inter-league agreements and the use of the so-called "reserve clause" in players' contracts. But this alleged distinction is merely the coincidental result of the fact that those cases were commenced by individuals, who, quite naturally, complained only of the particular effects of baseball's agreements upon their own activities and interests. Both cases nevertheless required a decision as to whether or not the agreements producing the results complained of were within the scope of the antitrust laws. The instant case, being a suit by the United States rather than a private treble damage action, seeks much more sweeping relief than would have been appropriate to the

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[7] The *Toolson* complaint (Par. 14) alleges that radio and television receipts of baseball exceeded $1,000,000 per year and exceeded 20% of the net profits of baseball each year. In both the *Kowalski* and *Corbett* cases the complaints alleged (*Kowalski* complaint, Par. 31, 32, and *Corbett* complaint, Par. XXI, XXII) that radio and television receipts in the All Star Game exceeded the gate receipts therefor and that World's Series radio and television receipts of $975,000 in 1950 exceeded the gate receipts therefor.

individual plaintiffs in the baseball cases, but the degree or nature of the relief requested cannot affect the fundamental question of whether or not the activities complained of are within the scope of the Sherman Act.

A further attempted distinction of the instant case is contained in the argument that the complaint here alleges a monopoly of telecasting and broadcasting and of making and distributing motion pictures, all of which activities, it is claimed, are clearly interstate commerce. No doubt broadcasting, telecasting, and making and distributing motion pictures are activities which, as such, have been held to be in interstate commerce. Appellant's argument, however, overlooks the fact that appellees are not engaged in any of these businesses. A promoter sells the rights to broadcast, televise, or film a boxing contest; as long as the purchaser of those rights pays the promoter's price, the promoter has no interest in whether or not the contest is actually broadcast, televised or filmed. Appellant might as well argue that a college which sells radio or television rights to its football games thereby engages in the radio or television business; or that by permitting newspaper reporters to attend its football games, for the purpose of publishing stories of the games, a college engages in the newspaper business.

Appellant's entire argument fails to recognize that each boxing contest, like each baseball game, is *sui generis*. It does not resemble an ordinary commodity of trade or commerce which can be mass-produced by the million. Each boxing contest is unique; it will never be duplicated, no matter how often the same two contestants may meet. Only a very few championship contests are possible during a given year,[8] and the amount of public interest which can

[8] For example, as alleged in the complaint, Par. 27, there were only 21 championship fights in the three year period preceding the institution of this action.

be evoked by a particular contest will depend on a number of intangible or unpredictable factors, including the weather, the time of year, the locale, the existence of competing athletic events of other kinds, and even the national origin of the contestants involved. It is the fact, however, that once a promoter has executed contracts with the contestants, he is the owner of the particular contest involved, with the right as a matter of property and not by virtue of any agreements with any other promoter, to exploit the contest to its fullest extent. He may determine what admission prices to charge and whether or not to sell the byproducts such as radio, television and motion picture rights, and at what prices, and his determination in any of these matters is absolutely final. Any monopoly which a boxing promoter has of the radio, television and motion picture rights of the contest being promoted is inherent in the unique character of the event; if is not in any way dependent upon or obtained by excluding others from the field, since there are no others who can have rights in that contest. Under a fair reading of the *Toolson* case, the boxing contests themselves are not within the Sherman Act. It must follow, therefore, that the exercise of property rights arising out of the promotion of such contests must likewise be outside the scope of such Act.

Since it is clear that the *Toolson* case requires affirmance here, there is no need to subject the parties to the expense, and this Court to the time, involved in achieving such affirmance on the regular docket. This Court, in the *Toolson* case, in effect determined not to change the legal rules of baseball in the middle of the game; if *stare decisis* means anything, it must mean that professional boxing is entitled to the same treatment as professional baseball.

## Conclusion

The judgment of the District Court should be affirmed or, in the alternative, the appeal of the appellant should be dismissed as insubstantial.

Respectfully submitted,

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MARCH 26, 1954.